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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THE STATE OF MONTANA, et al.,
Petitioner,

v.

NORTHERN CHEYENNE TRIBE OF THE
NORTHERN CHEYENNE INDIAN RESERVATION, et al.,
Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

DO THE DISCLAIMERS IN MONTANA'S ENABLING ACT AND CONSTITUTION DEPRIVE ITS STATE COURTS OF JURISDICTION TO ADJUDICATE WATER RIGHTS CLAIMED BY THE UNITED STATES FOR INDIAN TRIBES IN A GENERAL WATER ADJUDICATION PURSUANT TO THE McCARRAN AMENDMENT.

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INTEREST OF AMICUS CURIAE

The federal Enabling Act whereby the State of South Dakota was admitted into the Union disclaims "all right and title . . . to all lands

. . . owned or held by any Indian or Indian tribe; . . ." and provides that until such Indian title is extinguished, those lands "shall remain under the absolute jurisdiction and control of the Congress . . . ." Act of Feb. 22, 1889, Ch. 180, 25 Stat. 676, at § 4. That language was subsequently included in the South Dakota Constitution. S.D. Const. Art. XXII, paragraph Second. This disclaimer language is virtually identical to the disclaimer provisions in both the Enabling Acts and State Constitutions of the States of Arizona and Montana, although South Dakota does provide for a different procedure for repeal of the disclaimer.

At issue here is whether that disclaimer language serves to deprive a state court of subject matter jurisdiction to adjudicate Indian water rights held in trust by the United States in a general stream adjudication pursuant to the McCarran Amendment (43 U.S.C. § 666). The United States Court of Appeals for the Ninth

Circuit held for the first time that the disclaimer was such a bar to subject matter jurisdiction in the cases of Northern Cheyenne Tribe, et al. v. Adsit, et al., 668 F.2d 1080 (9th Cir. 1982), San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982), and Navajo Nation v. United States, 668 F.2d 1100 (9th Cir. 1982), hereinafter collectively referred to as Adsit.

South Dakota, a disclaimer state, commenced a general stream adjudication in state court on March 17, 1980, and served the United States with process, both in its own capacity and in its capacity as trustee for the various Indian tribes in South Dakota, in reliance on the McCarran Amendment. State of South Dakota ex rel. Mark V. Meierhenry v. Rippling Water Ranch, Inc., et al., Civ. 80-100, (Sixth Judicial Circuit 1980). This general adjudication will determine the extent and priority of all surface and groundwater rights (except small domestic water rights) in approximately two-thirds of the land area of South

Dakota, including the mainstem and western tributaries of the Missouri River and will include approximately 42,000 defendants. The United States has indicated that it intends to assert ownership or trusteeship of about 7.3 million acres of land.

South Dakota undertook this case (as most of the other western states have undertaken similar cases) so as to resolve questions relating to the quantity and nature of both reserved and non-reserved water rights. The decision of the Ninth Circuit in the Adsit case seriously jeopardizes this effort and so jeopardizes the ability of the State of South Dakota ultimately to administer its water laws on a comprehensive basis. South Dakota's interest in an orderly determination of all water rights in the state constitutes its interest herein.

SUMMARY OF ARGUMENT

The State of South Dakota, Amicus Curiae herein, contends that the reasoning of the court

in the Adsit decision is erroneous in its refusal to recognize the applicability of this Court's rationale as set out in the case of Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976); in its refusal to recognize the proprietary/governmental distinction in the application of state disclaimers of right and title to Indian land as set out by this Court in the case of Organized Village of Kake v. Egan, 369 U.S. 60 (1962); in its holding that compliance with Public Law 83-280 was the only method of acquiring subject matter jurisdiction over Indian water rights notwithstanding the fact that Public Law 83-280 excludes Indian water rights from the scope of its coverage; and in its rejection of the reasoning of the United States Court of Appeals for the Tenth Circuit as set forth in the case of Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979), cert. den. 444 U.S. 995 (1979). The State of South Dakota respectfully

urges that the disclaimer provision has no application in a McCarran Amendment setting because the United States is the proper party defendant to claim Indian water rights; that Public Law 83-280, by its own language, does not apply to adjudication of Indian water rights; and, that disclaimer does not serve as a bar to state court subject matter jurisdiction because a general water adjudication is a non-proprietary assertion of jurisdiction by the state. Therefore, the State of South Dakota respectfully urges that the Petition for a Writ of Certiorari be granted.

ARGUMENT

This brief is submitted by the State of South Dakota to this Court in support of the Petition for a Writ of Certiorari filed in the above-captioned matter. The petition asks this Court to grant review of a question of paramount importance to the western states. In the Adsit case the Ninth Circuit held, for the first time, that

certain disclaimer language found in the respective Enabling Acts and State Constitutions of the States of Montana and Arizona deprived the state courts of subject matter jurisdiction to determine federally reserved Indian water rights in a general water adjudication. It is the position of the State of South Dakota that such a holding virtually precludes the accomplishment of the congressional objectives of the McCarran Amendment (43 U.S.C. § 666) in the disclaimer states, is in direct conflict with the decision of the United States Court of Appeals for the Tenth Circuit in Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979) cert. den. 444 U.S. 995 (1979), and unduly limits this Court's interpretation of a similar disclaimer provision in the case of Organized Village of Kake v. Egan, 369 U.S. 60 (1962).

In passing the McCarran Amendment in 1952, Congress enacted a statutory waiver of sovereign immunity and granted state courts jurisdiction

over the United States in actions involving a comprehensive adjudication of water rights. The McCarran Amendment provides in pertinent part as follows:

> "(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a water system or other source . . . . The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances . . . ."

In 1976, this court held that the McCarran Amendment was a grant of jurisdiction to determine federally reserved Indian water rights. Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), hereinafter referred to as Akin. In Akin, this Court reasoned that both the language and the underlying

legislative policy of avoiding piecemeal litigation of water rights in a river system supported a holding that the Amendment applied to the adjudication of those reserved water rights of the United States held by it in trust for the Indian tribes. This Court held that a construction of the McCarran Amendment which excluded Indian water rights from its coverage, "would enervate the amendment's objective." 424 U.S. at 811.

The disclaimer provisions in both the Arizona and Montana Enabling Acts and Constitutions are in substance identical to the South Dakota disclaimer. See Arizona Const., Art. XX, paragraph Fourth; Montana Const., Art. I; S.D. Const. Art. XXII, paragraph Second. The provisions are also similar to the disclaimer clauses with reference to the States of New Mexico, North Dakota, Washington, Wyoming, Utah, and Idaho. These provisions disclaim all right and title to Indian lands, and provide that such lands shall be and remain within the absolute jurisdiction and

control of Congress. The Adsit court held that the presence of these disclaimer provisions served as a basis for distinguishing Akin. The court began its "analytical framework" with the critical assumption that the disclaimer provision constitutes a disclaimer of subject matter jurisdiction over Indian water rights, viewing the McCarran Amendment simply as a grant of personal jurisdiction over the United States. According to the Adsit court's reasoning, until a state's disclaimer is repealed, the state court has no subject matter jurisdiction and accordingly the McCarran Amendment and the Akin rationale are not applicable.

The Ninth Circuit Court of Appeals relied on the distinction between disclaimer and non-disclaimer states evidenced in Public Law 83-280 (Act of Aug. 15, 1953, Ch. 505, 67 Stat. 588), hereinafter referred to as Public Law 280, in reaching its decision that a disclaimer state could not assert subject matter jurisdiction over Indian water rights absent both a state's repeal of its

disclaimer, and tribal consent to such repeal in accordance with the 1968 amendments to Public Law 280. The Adsit court concluded that not to apply the disclaimer/non-disclaimer distinction in a McCarran Amendment setting would rob that distinction of all significance. In essence, the Adsit court holds that disclaimer states must comply with Public Law 280 to implement the McCarran Amendment. Nothing in the language or legislative history of either Public Law 280 or the McCarran Amendment supports such a proposition.

Initially, the State of South Dakota would point out that Public Law 280, as codified, specifically excludes water rights from its scope:

> "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; . . . or shall confer jurisdiction upon the State to adjudicate,

> in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

25 U.S.C. § 1322(b); see also, 28 U.S.C. § 1360(b), and compare 18 U.S.C. § 1162(b).

Therefore, it is difficult to see just what effect compliance with Public Law 280 would have on the disclaimer issue in a water rights setting. Compare Bryan v. Itasca County, 426 U.S. 373 (1976). Furthermore, this Court in Akin specifically addressed the relationship between Public Law 280 and the McCarran Amendment:

> "To be sure, 25 U.S.C. § 1322(b) and 28 U.S.C. § 1360(b) provide that nothing in those sections 'shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right of possession of [any real or personal property, including water rights, belonging to any Indian or any Indian tribe . . . that is held in trust by the United States].' This provision in both sections, however, only qualifies the import of the general consent to state jurisdiction given by those sections. It does not purport to limit the special consent to jurisdiction given by the McCarran Amendment. A contrary conclusion is foreclosed by the principle of construction that 'where there is no

> clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" (Citation omitted) 424 U.S. at 812-13 n.20.

The exclusion of water rights from Public Law 280 jurisdiction is common to both disclaimer and non-disclaimer states. Therefore, the Adsit court's distinction of Akin on the basis of the disclaimer is a dubious one.

In arriving at its decision the Adsit court expressly rejected the reasoning of the Tenth Circuit in the case of Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979), cert. den. 444 U.S. 995 (1979) where the court declined to distinguish between disclaimer and non-disclaimer states in a McCarran Amendment proceeding. There, the Tenth Circuit Court of Appeals considered the effect of the New Mexico disclaimer provision on the jurisdiction of state courts over federally reserved Indian water rights in a general stream adjudication. The New Mexico disclaimer provision is for legal purposes identical

to the Arizona and Montana disclaimers. The Jicarilla court ruled that there was no conflict between the disclaimer and the state assumption of jurisdiction. "The basic, fundamental reason is that the United States is the proper party to protect all federally reserved water rights, including those set aside for use by the Indian tribes." 601 F.2d at 1131. The court relied heavily on the Akin reasoning in reaching that decision.

The Jicarilla court also relied on footnote 20 of the Akin decision in rejecting the Public Law 280 argument later adopted by the court in Adsit, reasoning that the McCarran Amendment's specific grant of jurisdiction was controlling over the general grant of jurisdiction found in Public Law 280.

The Jicarilla court went on to address the argument made by the State of New Mexico that the disclaimer applied only to a proprietary

interest in Indian lands, finding such a contention "particularly persuasive in light of the non-proprietary intent in subjecting the United States to a state action involving a general water right adjudication as provided under the McCarran Amendment." 601 F.2d at 1133. The court found that the New Mexico disclaimer prohibited the state from exercising a proprietary interest in the Indian lands but did not prohibit state control which does not either interfere with tribal self-government or impair a right granted or reserved by federal law. 601 F.2d at 1135.

In reaching that decision, the Jicarilla court relied on this Court's interpretation of the Alaska disclaimer provision in Organized Village of Kake v. Egan, 369 U.S. 60 (1962). There, this Court indicated that the Alaska disclaimer was simply carrying forward congressional policy with reference to admission legislation as evidenced by the prior admission legislation touching Indians, which included the states of Arizona, New Mexico,

Montana, South Dakota, North Dakota, Washington, Wyoming, Idaho and Utah. The Court explained that Congress' intent by use of the disclaimer "was to preserve the status quo with respect to aboriginal and possessory Indian claims, so that statehood would neither extinguish them nor recognize them as compensable." 369 U.S. at 65. This Court held:

> "The disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest. It was determined, after some debate, to be the best way of insuring that statehood would neither extinguish nor establish claims by Indians against the United States." 369 U.S. at 69.

This Court then held that Alaska could regulate the off-reservation fishing of non-reservation Indians concluding that such regulation neither interfered with Indian self-government nor impaired any right granted or reserved by federal law. The Adsit court seizes upon this factual setting as a basis for distinguishing Kake, and refuses to apply the proprietary/governmental distinction to a question

involving reservation Indians on the reservation. Compare, White Mountain Apache Tribe v. Arizona, 649 F.2d 1274 (9th Cir. 1981).

This Court has repeatedly held, that "even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 147-48 (1973); Puyallup Tribe v. Washington Dept. of Game, 433 U.S. 165, 173 (1977). The Adsit court addresses only part of that test and holds that the interference with tribal self-government test set out in Williams v. Lee, 358 U.S. 217 (1958) has no application, relying on the case of McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973). However, the Adsit court does not carry through with the McClanahan rationale in that the Adsit court makes no preemption analysis at all, presumably because of its novel approach to the disclaimer issue.

Unlike the situation in McClanahan where there was a strong congressional policy against state taxation of reservation Indians, as evidenced by the specific Navajo Treaty involved and the Buck Act, there is a strong congressional policy, as evidenced by the McCarran Amendment, extending jurisdiction to the states on questions of water rights. As the court held in Jicarilla, supra:

> "'In summary, the cases stress that regulatory powers in Indian country or on Indian lands belong to the Congress except for inherent jurisdiction of the tribes. Congress may delegate this authority to the state, but when it does so it must be in specific terms.' (Citation omitted) Such delegation is precisely the effect of the McCarran Amendment." 601 F.2d at 1135.

The split in logic between the Adsit decision and the Jicarilla decision is clear. The Adsit case holds that a state constitutional disclaimer is a bar to state subject matter jurisdiction over Indian water rights. The Jicarilla case holds that the disclaimer is inapposite because the United

States is a proper party defendant, relying on Akin. The disclaimers involved are as a practical matter identical, as is the South Dakota disclaimer.

CONCLUSION

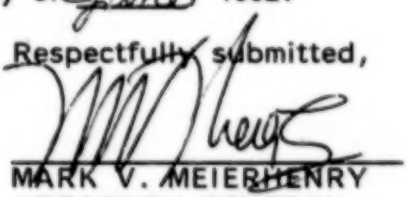
In light of the growing scarcity of water, there is a vital need for the western states to proceed with an orderly determination of all water rights, a need which compels South Dakota to urge this Court to grant the Petition for a Writ of Certiorari in the above-captioned case. As a practical matter, the holding of the Ninth Circuit Court of Appeals in the Adsit cases results in an absolute bar to any general adjudication of water rights in many of the states intended to benefit from the McCarran Amendment. Such a result is simply not justified under any federal statute, treaty, or relevant case law. The Ninth Circuit reasoning renders this Court's Akin decision inapplicable in the disclaimer states and virtually distinguishes Kake into nonexistence, and in the

process circumvents the strong congressional statement of purpose found in the McCarran Amendment, at least in the disclaimer states.

Furthermore, the Adsit reasoning is in direct conflict with the Jicarilla decision decided by the Tenth Circuit on an identical legal question, a question of supreme importance to the western disclaimer states. The State of South Dakota therefore respectfully urges that the Petition for a Writ of Certiorari be granted.

Dated this 21th day of June, 1982.

Respectfully submitted,



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